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No. 89-1217

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

JAMES P. LEHNERT, *et al.*,
Petitioners,

v.

THE FERRIS FACULTY ASSOCIATION-MEA-NEA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court below erred when it concluded, based on the factual findings of the District Court, that expenditures for certain activities engaged in by the respondent unions were "normally or reasonably employed to implement or effectuate the duties of" the exclusive representative, *Ellis v. Railway Clerks*, 466 U.S. 435, 488 (1984), so as to be constitutionally chargeable to objecting service (*i.e.*, agency) feepayers.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Ferris Faculty Association-MEA-NEA ("FFA"), Michigan Education Association ("MEA"), and National Education Asssociation ("NEA") submit this brief in opposition to the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

Background

Since at least 1975, FFA has been recognized under the Michigan Public Employment Relations Act, Mich. Comp. Laws § 423.211, as the exclusive representative

for a bargaining unit consisting of faculty at Ferris State College, which is a public institution of higher education in Michigan. FFA is a local affiliate of MEA at the state level and of NEA at the national level. MEA and NEA are labor organizations which, through a network of local affiliates such as FFA, represent and provide services to employees of public schools, colleges and universities throughout Michigan (in the case of MEA) and the nation (in the case of NEA).

During the 1981-82 academic year, which is the year at issue here, petitioners were included in the 502-employee bargaining unit represented by FFA, but did not join FFA. The collective bargaining agreement that was in effect during that year included a service-fee provision, pursuant to which all employees in the bargaining unit who did not choose to become members of FFA were required to pay a service fee "equivalent to the amount of dues uniformly required of members of [FFA], less any amounts not permitted by law." Appendix to Petition for a Writ of Certiorari ("Pet. App.") at 21a. As a local affiliate of MEA and NEA, FFA has a "unified membership structure"—*i.e.*, if an employee chooses to become a member of FFA, he or she also must become a member of, and pay dues to, MEA and NEA. Pet. App. at 19a.

The service fee during the 1981-82 academic year for employees in the FFA bargaining unit who did not assert a timely objection to the amount of the fee was $284.00, which corresponded to the full "unified" dues paid by members. Of that amount, $24.80 was disbursed to FFA, $211.20 to MEA, and $48.00 to NEA. Pet. App. at 24a. Feepayers who objected to paying the full amount of the fee could pay a reduced fee determined through a procedure established by the unions.[1]

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[1] In the courts below petitioners challenged certain aspects of the unions' procedure, but this challenge is not pursued in the Petition.

Petitioners brought suit under 42 U.S.C. § 1983, contending that the service fee included the costs of certain expenditures for which objecting feepayers could not constitutionally be charged. Placing a strict burden of proof on the respondent unions, *see* Pet. App. at 61a-62a, 84a-86a, the District Court concluded that the unions had established the chargeability of only 2.75% of the NEA portion of the fee, 3.4% of the MEA portion of the fee, and 81% of the FFA portion of the fee, Pet. App. at 60a, 64a, 66a, for a total chargeable fee for the 1981-82 academic year of $28.59, as contrasted with the full "unified" membership dues of $284.00. Pet. App. at 75a, 78a. (In reaching these conclusions the District Court acknowledged that the unions may in fact have expended a significantly greater portion of their budgets for chargeable activities, but it held that they had failed to carry their burden of proof in this regard. Pet. App. at 59a, 63a, 64a-66a.)[2] The reduced percentages calculated for 1981-82 also were used by the court to establish the fee that could be charged to petitioners for the four subsequent academic years involved in this case. Pet. App. at 75a-76a, 78a.

Although the District Court ruled that petitioners were entitled to an approximately 90% reduction of their service fee, it included as chargeable seven activities which, in petitioners' view, cannot constitutionally be charged to objecting feepayers. The court's rulings with regard to these seven activities were affirmed by the Court of Appeals, and petitioners now challenge them before this Court. The seven activities in question, and the findings below with respect to them, are as follows.

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[2] The court denied the unions' request for an opportunity to supplement the record with more detailed evidence on these points. Pet. App. at 82a-86a.

1. *Activities Not Conducted Exclusively for Petitioners' Own Bargaining Unit*

MEA and NEA engage in numerous activities to assist their local affiliates such as FFA. Often those activities are not directed at any particular local bargaining unit, but are for the benefit of employees in *all* units, as, for example, when MEA works "to obtain funds for public education generally." Pet. App. at 9a. Other types of services—for example, assistance in collective bargaining—are available at all times to all units, but are provided to individual units only as the need arises. Pet. App. at 32a, 33a, 41a, 42a, 43a. MEA and NEA do not provide these or other services on a "pay-as-you-go" basis; instead, all feepayers in all units are charged equally, on what the District Court characterized as a "cost-sharing basis." Pet. App. at 56a. Petitioners challenged this aspect of the fee-setting process, contending that they should be charged on a year-by-year basis for only those specific services that are provided directly to the FFA bargaining unit in a particular year.

In rejecting petitioners' contention, the District Court found as fact that petitioners' approach "would logically lead to drastic fluctuations in the amount of the service fee charged to the objecting nonmembers of individual units." Pet. App. at 56a (emphasis omitted). And, because state statutes typically provide that service fees can never exceed membership dues even in years where the local bargaining unit receives an extraordinarily high level of services, the court found as fact that "a unit-by-unit breakdown of chargeable expenditures would only exacerbate the free rider problem and thereby frustrate the governmental interest that the [Supreme] Court has repeatedly recognized lies at the heart of statutes authorizing union/agency shops." Pet. App. at 56a-57a.

Based upon the evidence, the court further found that it probably would not be possible for NEA and MEA to "breakout discrete expenses by bargaining unit," Pet.

App. at 57a, but that even if it were possible to make such a unit-by-unit breakdown, this "would create [such] an unreasonable and unmanageable administrative burden on the instant union defendants" that the unions would likely have no choice but to forgo collecting amounts to which they are lawfully entitled. Pet. App. at 57a.

The District Court ruled that petitioners' demand for a unit-by-unit breakdown of MEA and NEA expenditures was "not warranted by the Constitution or by logic under the facts of the case at bar." Pet. App. at 57a. The Court of Appeals affirmed. Noting that the expenditures in question "were pertinent to the unions' duties as bargaining representatives," Pet. App. at 11a, the court concluded that the District Court's ruling was consistent with this Court's decision in *Ellis v. Railway Clerks*, 466 U.S. 435 (1984). Pet. App. at 10a-11a.

2. *Lobbying to Obtain Funding for Public Education*

The District Court held that objecting feepayers may lawfully be required "to contribute to the cost of the union's lobbying activities *to the extent that the activities are germane to the union's duties as bargaining representative.*" Pet. App. at 54a (emphasis added). Applying that test, the court declined to approve the chargeability of most of the unions' lobbying activities, finding that the unions had not carried their burden of proof as to the germaneness of those activties. Pet. App. at 58a-59a, 62a-64a, 64a-66a, 85a-86a. The court did, however, approve the chargeability of expenditures for lobbying designed to obtain increased funding for public education, and it did so in two contexts.

First, the court approved direct expenditures for the MEA's Preserve Public Education ("PPE") Program. Finding as fact that the PPE Program was devoted to obtaining increased funding for public educaiton, Pet. App. at 31a, the court characterized the program as "really the front line bargaining of [the unions'] con-

tracts," because "if [the unions] have no way of raising that money, which is all allocated through the legislative process or an election, then [they] have no way to bargain," *id.* The court concluded that "[i]n a public sector bargaining unit where funding for employment positions, salaries and benefits is conditioned upon legislative appropriations, such lobbying [*viz.*, lobbying 'directed at securing funding for public education in Michigan'] is directly related to the statutory duties of the exclusive representative." Pet. App. at 58a.

The Court of Appeals affirmed the District Court's conclusion, rejecting petitioners' contention that they could not be charged for the PPE Program lobbying because "such lobbying was not directly concerned with Ferris State College and the Ferris Faculty Association." Pet. App. at 9a. "It is unrealistic," the court stated, "to expect a union, when lobbying a state legislature for funds for public education, to lobby for monies to support each specific institution separately." *Id.* Accordingly, the court held that lobbying to obtain funds for public education generally was sufficiently related to the unions' duties as exclusive bargaining representative to be chargeable.

The question of the chargeability of lobbying activities designed to increase funding for public education was also addressed by the District Court in a less direct context—*viz.*, in determining what proportion of the costs expended on MEA's publication, the *Teachers' Voice*, was chargeable to objectors. Reasoning that under *Ellis* "this expense [of publishing a union magazine] is chargeable to the same extent that the publication reports on activity that is chargeable," Pet. App. at 63a, the court undertook to determine how many of the column inches in the *Teachers' Voice* were devoted to reporting on chargeable activities. Having made clear that it regarded lobbying as chargeable only "to the extent that the activities are germane to the union's duties as bargaining representative," Pet. App. at 54a, the court calculated, based on an

"exhaustive[]" review of the contents of the *Teachers' Voice*, the proportion of the column inches reporting on lobbying that dealt with chargeable matters. Pet. App. at 63a, 80a. The Court of Appeals affirmed the District Court's calculation in this regard.[3]

3. *Other Political Activities Designed to Obtain Funding for Public Education*

Although the District Court found that the PPE program, discussed *supra* at 5-6, was a "lobbying" program, petitioners maintained on appeal that "the program primarily involved electoral campaigns, including the contesting of ballot issues and the passing of millages." Pet. App. at 8a. The Court of Appeals held that this contention was of no moment, because the PPE Program, whether characterized as "lobbying" or as some other form of political activity, was pursued solely to achieve measures that were "*necessary to fund public education*," Pet. App. at 9a (emphasis in original), and was therefore "directly related to collective bargaining," *id.* The court took the same approach with regard to the articles in the *Teachers' Voice* that reported on various political activities. Pet. App. at 9a-10a, 80a.

4. *Public Relations Activities Designed to Enhance the Reputation of the Teaching Profession*

The District Court determined that the articles in the *Teachers' Voice* that dealt with "public relations" were reporting on chargeable activities. Pet. App. at 80a. The Court of Appeals affirmed, noting that these articles were

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[3] In response to petitioners' contention that the District Court may have erred in its characterization of "a few particular articles" in the *Teachers' Voice*, the Court of Appeals declined petitioners' invitation "to review each and every union expenditure, no matter how minor," because the court was satisfied "that the district court correctly interpreted and applied the law to the facts of this case." Pet. App. at 10a, n.1.

"designed to enhance the reputation of the teaching profession." Pet. App. at 12a.

5. *Professional/Educational Activities Designed to Improve the Profession and the Skills of Teachers*

Certain of the articles in the *Teachers' Voice* that were found by the District Court to report on chargeable matters involved what petitioners characterize as 'nonbargaining activities related only generally to the employees' profession." Petiiton at i. The Court of Appeals affirmed the District Court on this point. It described the challenged activities as "professional/educational expenditures intended to improve the profession generally and the skills of teachers specifically," Pet. App. at 12a, and held that they were "sufficiently related to the unions' duty to represent bargaining unit employees effectively so as to be chargeable to dissenters," *id.*

6. *Conventions and Meetings*

The District Court upheld the chargeability of expenses for the MEA Representative Assembly and the NEA Convention. The court reasoned that "[b]oth are clearly chargeable to plaintiffs under *Ellis*," Pet. App. at 63a, because in *Ellis* this Court upheld the chargeability of all the costs associated with an international union convention. "By the same rationale," the District Court also approved the chargeability of FFA's expenses in "sending representatives to [a] coordinating council, where bargaining strategies and representational policies are developed for the [MEA/NEA administrative] unit composed of the Ferris State College and Central Michigan University bargaining units." Pet. App. at 58a. The Court of Appeals affirmed these rulings, concluding that the District Court had correctly applied *Ellis*. Pet. App. at 5a-6a.

7. *So-Called "Strike Preparation" Activities*

In the fall of 1981, collective bargaining between FFA and Ferris State College was not proceeding smoothly.

Although public employee strikes are unlawful in Michigan, MEA conducted a "job action investigation" in order "to determine the willingness of the local's membership to support a strike if necessary, and to put pressure on the employer by making outward preparations for a possible strike." Pet. App. at 29a. As evidence of "[t]he effectiveness of . . . [a job action investigation] as a bargaining tool," Pet. App. at 29a, the District Court cited the fact that such an investigation rarely culminates in an actual strike. *Id.* And, indeed, *no strike occurred here.* Pet. App. at 30a.

FFA made two types of expenditures in connection with the job action investigation. First, in conjunction with MEA, FFA established a "crisis center" which "serve[d] as a meeting place for the local's membership, a base from which tactical activities such as [concededly lawful] informational picketing can be conducted, and serve[d] to apply additional pressure on the employer by suggesting, whether true or not, that the local [wa]s prepared to strike if necessary." Pet. App. at 30a. Second, money was spent for "informational picketing, media exposure, signs, posters and buttons." *Id.* The purpose of these latter expenditures was explained as follows by the District Court, *id.*:

> [T]hese expenses are incurred for the purpose of informing the public of the issues involved in an attempt to bring public pressure to bear on the employer. This type of public opinion and support is very important during contract negotiations involving public sector labor unions such as the FFA given the nature of the employment and the funding available to the college.

The District Court upheld the chargeability of both types of expenditures, *id.* at 59a, stating:

> The question whether any of these expenditures may have been chargeable had a strike occurred is one that this court need not address. The "crisis center" never

became a "strike headquarters" but still served a useful purpose in the negotiations process. The rent paid to hold membership meetings was necessary to keep the employees of the bargaining unit apprised of the progress of the negotiations and to get feedback on the members' demands. Likewise, the expenditures for disbursing information to the public that was favorable to the bargaining unit's position is well within the realm of reasonable and legal bargaining tactics in the public sector labor context. Therefore, I hold that the entire [amount] expended by the FFA for these purposes is chargeable to the plaintiffs.

The Court of Appeals affirmed. It determined that the District Court's findings of fact were not clearly erroneous, and agreed with the conclusions that the court reached on the basis of those findings. Pet. App. at 11a-12a.

REASONS FOR DENYING THE WRIT

In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), this Court "define[d] the line between union expenditures that all employees must help defray and those that are not sufficiently related to collective bargaining to justify their being imposed on dissenters." *Ellis*, 466 U.S. at 447. Petitioners contend that the courts below placed the seven challenged expenditures on the wrong side of the *Abood/Ellis* dividing line. Indeed, despite the fact that they were charged for only *2.75%* of NEA's expenditures and *3.4%* of MEA's expenditures, petitioners assert that "the panel majority placed no practical limits on a union's ability to force objecting nonmembers to subsidize its speech and associational activities." Petition at 9. In urging this Court to grant review, petitioners do not contend that there is any actual conflict in the circuits or among state courts as to the chargeability of any of the challenged expenditures. Instead, petitioners maintain that this case warrants review because it presents issues

of "exceptional importance," Petition at 17, as to which there is "confusion" among the courts of appeals, Petition at 21.

As we will show, petitioners' submission is bottomed on repeated distortions of what the courts below held and on a total misunderstanding of the operational relationship among affiliated unions such as FFA, MEA, and NEA. Fairly characterized, this case presents no issue warranting review.

I. THE CHARGEABILITY OF ACTIVITIES NOT CONDUCTED EXCLUSIVELY FOR PETITIONERS' OWN BARGAINING UNIT

As this Court has recognized, the duties of a collective bargaining representative frequently require "[t]he services of lawyers, expert negotiators, economists, and research staff, as well as general administrative personnel." *Abood*, 431 U.S. at 221. In order to realize economies of scale in acquiring such services, local unions generally affiliate with state and/or national organizations. *See NLRB v. Financial Institution Employees*, 475 U.S. 192, 200 n.5 (1986). In the typical affiliation arrangement, the local union makes payments to the state and/or national organizations to defray the costs of the services provided by the latter. It is settled that such affiliation payments may be charged to objecting feepayers as long as the payments are not used by the parent organizations "to subsidize activities for which nonmembers may not be charged." *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 307 n.18 (1986).

Petitioners attack the method by which MEA and NEA apportion their costs among local affiliates, but that attack is based on a distortion of the record and has no support in the caselaw.

A. Like virtually all state and national labor organizations, MEA and NEA do not charge their local affiliates on a pay-as-you-go basis for services rendered. Rather,

MEA and NEA function on a cost-sharing basis, *see* Pet. App. at 56a, with employees in all bargaining units charged equally for the costs of the ongoing services of the state and national organizations that are "pertinent to the unions' duties as bargaining representatives," Pet. App. at 11a. *See supra* at 4. Although petitioners contend that this system requires feepayers to pay for "activities on behalf of persons not in the employees' bargaining unit," Pet. App. at i, *see* also *id.* at 9-12, this contention misses the point of how the service fee system actually operates.

To give a concrete example, all feepayers—including those in the FFA bargaining unit—pay equally for the cost of maintaining the programs through which MEA and NEA provide assistance to local affiliates in collective bargaining. *See supra* at 4. Although FFA will not have occasion to avail itself of this assistance every year, it is not correct to state that in years when it does not require such assistance FFA is paying MEA and NEA for nothing, or that FFA is simply supporting assistance provided to other units. When MEA and/or NEA assist FFA in negotiating a collective bargaining agreement, the value of that assistance is realized not only in the year the assistance is provided, but throughout the term of the agreement. More generally, the fact that MEA/NEA support is "waiting in the wings" is of benefit to FFA throughout the collective bargaining process, even if it does not become necessary for FFA actually to call upon MEA or NEA for assistance. Accordingly, while petitioners characterize the unions' fee system as one that makes *Ferris* employees pay for services provided to *other units*, the reality, as the District Court found, is that the system is one in which employees in *all* units pay equally for services that are equally *available* to all. Petitioners' argument ignores this central feature of the unions' service fee structure.

The District Court found not only that petitioners' demand for a fluctuating pay-as-you-go fee system had

no legal basis, but that such a system would in addition be completely unworkable and would inevitably result in the unions' being unable to collect fees for services that are properly chargeable. *See supra* at 4-5. Thus, Judge Posner's observation in *Gilpin v. AFSCME*, 875 F.2d 1310, 1316 (7th Cir.), *cert. denied*, —— U.S. ——, 110 S.Ct. 278 (1989), is equally apt here: in advancing this demand "the plaintiffs and the National Right to Work Foundation are merely trying to hamstring the union."

B. Petitioners' contention that this Court imposed a requirement of a unit-by-unit breakdown in *Ellis*, *see* Petition at 9-12, is plainly wrong. Because petitioners' demand for such a breakdown relates almost exclusively to the costs of producing MEA's publication, the *Teachers' Voice*,[4] it is particularly pertinent to consider how *Ellis* dealt with publication expenditures. In *Ellis*, the defendant union charged feepayers in all bargaining units equally for the cost of producing the *international union* magazine, excepting only the portions that were devoted to nonchargeable "political causes." *See* 466 U.S. at 450. The court of appeals in *Ellis* had upheld this practice in its entirety,[5] and this Court affirmed, except as to the costs of reporting on union organizing and certain litigation. 466 U.S. at 450-51. *See infra* note 6. By excluding only articles about the latter two activities, this Court *affirmed* the chargeability of "articles [in the international union magazine] about negotiations, con-

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[4] Other than the costs of participation in meetings and conventions, which petitioners challenge on other grounds, *see infra* at 19-20, the only expenditures of MEA that were sustained as chargeable by the courts below were the costs of producing the *Teachers' Voice*. *See* Pet. App. at 62a-64a. And the amount each petitioner was required to pay for services of *NEA* was only $1.32 per year. *See* Pet. App. at 66a. Thus, as a practical matter, the "unit-by-unit" issue pertains almost exclusively to the costs of producing the *Teachers' Voice*.

[5] *See Ellis v. Railway Clerks*, 685 F.2d 1065, 1074 (9th Cir. 1982), *aff'd in part and rev'd in part*, 466 U.S. 435 (1984).

tract demands, [and] strikes" in units other than the objectors' own unit, *see* 466 U.S. at 450, and "reports on significant events for individual [units]" other than that of the objectors, *see* 685 F.2d at 1074. So too, *Ellis* affirmed the union's practice of charging objectors in all bargaining units equally for the costs of the international union's social activities, *see* 466 U.S. at 449-50, 456, and its conventions, *id.* at 448-49, 456, without regard to how much of the time spent in those activities, if any, was directed at the objectors' own bargaining unit. Thus, *Ellis* does not support petitioners' assertion that "the bargaining-unit limitation applied to publications," Petition at 12.[6]

C. Nor is there any conflict—or, to use petitioners' term, "confusion," Petition at 21—among the courts of appeals with regard to this point. Petitioners do not cite a single decision of the lower federal courts, or of any state court, that has required the unworkable unit-by-unit breakdown they urge. The fact is that every court which has considered petitioners' theory has rejected it. *See Abels v. Monroe County Education Association*, 489 N.E.2d 533 (Ind. App. 1986), *cert. denied*, 480 U.S 905 (1987); *New Prairie Classroom Teachers Assn v. Stewart*, 487 N.E.2d 1324 (Ind. App. 1986), *cert. denied*, 480 U.S. 917 (1987); *Antry v. Illinois Educational Labor Relations*

[6] Petitioners make much of the fact that *Ellis* held union organizing (and reporting about such organizing) to be nonchargeable. *See* Petition at 11. But the Court did not base this holding on the "unit-by-unit" theory urged by petitioners. Rather, the *Ellis* Court held that organizing, whether conducted within the objector's bargaining unit or outside the unit, *see* 466 U.S. at 452 & n.13, is not sufficiently related to a union's duties as exclusive representative under the Railway Labor Act to be chargeable at all, *id.* at 451-53. Nor did the Court's unique treatment of *litigation* costs announce any general requirement of a unit-by-unit breakdown of the costs and benefits of the programs provided by a national union. *See id.* at 453, 455.

Board, No 4-88-0314 (Ill. App. March 15, 1990), slip. op. at 46-50.[7]

II. THE CHARGEABILITY OF LOBBYING AND POLITICAL ACTION TO OBTAIN FUNDING FOR PUBLIC EDUCATION

The courts below allowed petitioners to be charged for the costs of the unions' lobbying on one specific subject—securing funds for public education. *See supra* at 5-6. Because without such funding there would be no way for the unions to engage in collective bargaining in any real sense, this limited category of lobbying constitutes, as the District Court put it, "the front line bargaining of [the unions'] contracts." *See supra at* 5-6.

The chargeability of such lobbying has been uniformly sustained, and this Court has repeatedly declined to review the issue. *See, e.g., Robinson v. State of New Jersey*, 741 F.2d 598, 609 (3d Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985); *Knight v. Minnesota Community College Faculty Assn.*, 571 F. Supp. 1, 6-7 (D. Minn. 1982), *aff'd mem.*, 460 U.S 1048 (1983); *Champion v. State of California*, 738 F.2d 1082 (9th Cir. 1984), *cert. denied*, 469 U.S. 1229 (1985); *Boonton Bd. of Educ. v. Kramer*, 99 N.J. 523,

[7] Petitioners assert that "[t]he majority's decision in this case as to activities outside the bargaining unit stands in stark contrast to the holding of another panel of the Sixth Circuit" in *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987), as well as the holding in *Hudson v. Chicago Teachers Local 1*, 743 F.2d 1187, 1193 (7th Cir. 1984), *aff'd on other grounds*, 475 U.S. 292 (1986). *See* Petition at 18-19. That contention is unfounded. Neither *Tierney* nor *Hudson* involved a demand for a unit-by-unit breakdown of expenditures. What is more, contrary to petitioners' contention, the general tests of chargeability articulated in those cases, quoted in the Petition at 18-19, are the same as the test the Sixth Circuit applied here. *See, e.g.*, Pet. App. at 7a (lobbying is chargeable where it is "pertinent to the duties of the union as a bargaining representative"); Pet. App. at 11a (activities not confined to petitioners' bargaining unit are chargeable if they are "pertinent to the unions' duties as bargaining representatives").

494 A.2d 279 (1985), *cert. denied*, 475 U.S. 1072 (1986); *Antry v. Illinois Educational Labor Relations Board*, *supra*, slip op. at 80-81.[8] Petitioners' suggestion that this uniform body of law conflicts with *Abood*, *see* Petition at 12-13, is plainly wrong. In *Abood*, this Court identified efforts to obtain "subsequent approval [of a written collective-bargaining agreement] by other public authorities; [and] related budgetary and appropriations decisions" as a type of lobbying that "might be seen as an integral part of the bargaining process." 431 U.S. at 236. But in offering this one example, the Court did not suggest in *Abood* that other types of lobbying related to terms and conditions of employment are not chargeable. Moreover, the limited category of lobbying at issue here, like the example offered in *Abood*, *is* "an integral part of the bargaining process."[9]

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[8] Petitioners suggest that a statement in *Beck v. Communications Workers*, 776 F.2d 1187, 1211 n.31 (4th Cir. 1985), *aff'd en banc*, 800 F.2d 1280 (4th Cir. 1986), *aff'd on other grds.*, 487 U.S. 735 (1988), may intimate a different view. But the lobbying at issue in *Beck* was " 'far remote . . . from collective bargaining, contract negotiation and grievance adjustment,' for instance, 'lobbying efforts on behalf of the adoption of the Panama Canal Treaty, and the Equal Rights Amendment.' " 776 F.2d at 1210-11 (quoting opinion of special master). Indeed, the Fourth Circuit referred with apparent approval to the special master's suggestion that lobbying on such matters as "the Telecommunications Act or Occupational Health and Safety Regulations" might be chargeable. *Id.* And petitioners concede that the statement in *Beck* is in any event *dictum*. *See* Petition at 20.

[9] Petitioners are therefore wrong in attempting to distinguish two of the cases we have cited—*Champion* and *Knight*—on the ground that those were "cases in which the 'process of establishing a written collective-bargaining agreement . . . require[d] not merely concord at the bargaining table, but subsequent approval by other public authorities' and 'related budgetary and appropriations decisions might be seen as an integral part of the bargaining process.' " Petition at 19-20, n.10, quoting *Abood*, 431 U.S. at 236. Even if *Champion* and *Knight* had involved only that kind of lobbying, they would be indistinguishable in principle from this case, which, as we have shown, involves lobbying that is part and parcel of the bargaining process. But in point of fact, the lobbying held to be chargeable in *Champion* included all "lobbying activities designed to foster policy goals and collective negotiations and contract administration, or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and conferring with the state employer." 738 F.2d at 1083, 1086. In *Knight* as well, it is clear that the lobbying the court characterized as "relat[ing] directly to collective bargaining," 571 F. Supp. at 7, included at least the kinds of lobbying at issue here. *See Knight v. Minnesota Community College Faculty Assn.*, 111 L.R.R.M. 3156, 3162-63 (D. Minn. 1982) (findings of fact).

The same is true with respect to the other forms of political action at issue. Although petitioners state broadly that this case involves the chargeability of activities in the realm of "electoral politics, including campaigns concerning ballot issues," Petition at i, *see also id. at* 5, 12-14, the only activities that were held to be chargeable were campaigns to raise funds for public education, such as the contesting of ballot issues on that subject and the passing of millages. *See* Pet. App. at 8a-9a. Thus, the foregoing discussion of lobbying is equally applicable to the issue of "electoral politics" petitioners seek to raise.

Nor is there any merit to petitioners' contention that this Court has declared school funding to be a matter of public concern that affects teachers' employment "only tangentially and insubstantially," and that nonmembers therefore cannot be required to support the unions' activities relating to it. *See* Petition at 13-14 & n.6, citing *Pickering v. Board of Education*, 391 U.S. 563 (1968). In *Pickering* the Court merely observed that the objection a teacher had voiced to a school district's allocation of funds—namely, that the school district was spending too much on athletics—was an expression of that particular individual's concern as a citizen rather than as an employee. *See id.* at 569, 571, 574. The Court did not suggest that issues as to the allocation of funds for education, or as to the level of funding of education generally, do not

significantly affect teachers' employment. Obviously, they do. *See generally Abood*, 431 U.S. at 228.

To be sure, questions about school funding, while they directly affect teachers' employment, are also matters of public concern. But *Abood* squarely rejects the notion that a feepayer has a constitutional right to refuse to pay his or her fair share of the costs of union activities that are otherwise chargeable, simply because those activities involve a matter of public concern as to which the feepayer has a different view than the union. *See* 431 U.S. at 222, 230. As the Court recognized, collective bargaining in the public sector almost always involves such matters, *id.*, and if there were a "public concern" exception to chargeability, the public sector agency fee, upheld in *Abood*, would be of no practical significance.

In sum, on the question of lobbying and other political action designed to obtain funding for public education, the decision below does not conflict with any decision of this Court or of any other court, and does not merit further review.

III. THE CHARGEABILITY OF PUBLIC RELATIONS ACTIVITIES DESIGNED TO ENHANCE THE REPUTATION OF THE TEACHING PROFESSION, AND PROFESSIONAL/EDUCATIONAL EXPENDITURES DESIGNED TO IMPROVE THE PROFESSION AND THE SKILLS OF TEACHERS

Turning to what they describe as the unions' "public relations activities" and "non-bargaining activities related only generally to the employees' profession," Petition at i, petitioners assert that the Court of Appeals approved the chargeability of these items only "because it viewed the expenditures as *de minimis*." *Id.* at 14. Once again, however, petitioners fail to provide the full picture. The "public relations" activities in question consist solely of articles in the *Teachers' Voice* "designed to enhance the

reputation of the teaching profession," Pet. App. at 12a; and the "non-bargaining activities" consist solely of "professional/educational expeditures intended to improve the profession generally and the skills of teachers specifically," *id.* Given these findings, the Court of Appeals concluded that these activities, like the social activities held to be chargeable in *Ellis*, are "sufficiently related to [collective bargaining]" to be chargeable, Pet. App. at 12a, quoting *Ellis*, 466 U.S. at 449, and that *because of this relationship* no further scrutiny of these *de minimis* expenditures was necessary, *see* Pet. App. at 12a, citing *Ellis*, 466 U.S. at 450.[10]

It is therefore completely consistent with this Court's decisions to charge petitioners for the kinds of public relations and professional/educational activities involved here. Nor do petitioners assert that any lower court decision is to the contrary, and we are aware of none. The issue does not merit review.[11]

IV. THE CHARGEABILITY OF CONVENTIONS AND MEETINGS

The courts below upheld the chargeability of the costs of sending FFA delegates to the NEA Convention, the MEA Convention (known as the Representative Assem-

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[10] Petitioners' contention that these activities have a higher degree of First Amendment content that the social activities involved in *Ellis*, see Petition at 14, does not call for a different result. *Abood* acknowledges that a constitutionally permissible agency fee arrangement necessarily implicates important First Amendment interests, *see* 431 U.S. at 222, 230; and in *Ellis* the Court approved the chargeability of activities that "have direct communicative content and involve the expression of ideas," 466 U.S. at 456.

[11] Petitioners state cryptically that "the panel majority allowed the nonmembers to be charged for certain political and ideological activities that were completely unrelated to bargaining." Petition at 14. As indicated by petitioners' citation to the Appendix at 10a n.1, this contention is simply an overblown reference to the point discussed in note 3, *supra*, which obviously does not merit review by this Court.

bly), and the "13E Coordinating Council," which is a forum "where bargaining strategies and representational policies are developed for . . . the Ferris State College and Central Michigan University bargaining units." Pet. App. at 5a-6a, 58a, 62a-63a. Although petitioners attempted to distinguish these meetings from the international union convention that was held to be chargeable in *Ellis*, 466 U.S. at 448-49, 456, the Court of Appeals correctly found the proffered distinctions unpersuasive.

The court noted that the convention in *Ellis*, like the meetings and conventions here, involved political elements, and that this Court nevertheless held the entire convention to be chargeable. Pet. App. at 6a. The Sixth Circuit also dismissed as simply "a technical difference in union organization," Pet. App. at 6a, petitioners' contention that MEA and NEA, unlike the international union in *Ellis*, are mere "affiliates" of the bargaining representative, FFA. The court noted that this contention was in any event foreclosed by the District Court's finding that FFA "*as affiliated* is the exclusive representative." *Id.* (emphasis added). Because petitioners as much as admit that they merely seek to reargue the facts on these points, *see* Petition at 11, n.5, certiorari is not warranted.

V. THE CHARGEABILITY OF THE SO-CALLED "STRIKE PREPARATION" ACTIVITIES

Petitioners assert that "strike preparation" activities cannot be chargeable where public employee strikes are illegal, even when, as here, no strike takes place, because "[t]he state's only interest in this context is in preventing such subsidization, not in sanctioning it and thus encouraging the illegal activity." Petition at 16. This issue does not merit this Court's attention for several reasons. To begin with, the issue is *sui generis*, and petitioners do not cite a single case other than this one in which it has arisen. What is more, the issue petitioners seek to raise—*i.e.*, whether objecting feepayers can be charged for

expenditures for violating state law or for planning unlawful activity—is not actually presented by this case.

Although Michigan has declared that public school teacher strikes are illegal, the State has not declared that it is unlawful, or even contrary to public policy, for a union to threaten such a strike. Nor has there been any finding that to allow such speech "encourag[es] the illegal activity," as petitioners assert. To the contrary, the findings of the District Court in this case, affirmed by the Court of Appeals, are that the actions in which the unions engaged were not likely to result in an illegal strike. Pet. App. at 29a, 11a. For all that appears, allowing a union to threaten a strike, thereby placing pressure on the employer in a way that may help to bring about an agreement, may make a strike *less* likely than if the union were required to refrain from exerting such pressure. Thus, this case presents no findings or evidence from which it could be concluded that respondents' actions were contrary to state law, or that those actions "encourag[ed] . . . illegal activity." Petition at 16.

Finally, even accepting petitioners' assertion that the unions' activities included "planning unlawful acts" (acts which, we reiterate, did not actually occur), *see* Petition at 16, and assuming further that such activities are *ipso facto* nonchargeable even where they are pursued on behalf of the bargaining unit in connection with collective bargaining, the issue petitioners seek to raise still is not properly before this Court. The District Court specifically found that all of the money spent by the unions on so-called "strike preparation activities" served to promote other plainly chargeable purposes that were beyond reproach. *See* Pet. App. at 30a, 59a, quoted *supra* at 9-10. To put it simply, no money was spent solely to "plan unlawful acts": the money in question would have been spent even if the unions' public statements had been confined to explaining the unions' position on the issues and had not also included a threat of a strike.

The District Court emphasized these distinguishing features in approving the chargeability of the particular FFA expenditures at issue. Indeed, the court refused to approve the chargeability of *NEA's* expenditures for "job actions," stating that "whether certain expenditures for job actions are to be considered chargeable is a determination to be made on the basis of the particular fact situations," and that the facts surrounding the NEA expenditures had not been sufficiently developed. Pet. App. at 65a.

Thus, the question whether a union may charge objecting feepayers for expenditures devoted to "threatening and preparing for" unlawful activity, Petition at i, is not presented by this case.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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